Tai May Chean v New Way Capital Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-561–03 OF 2017 AND W-02(IM)(NCC)-562–03 OF 2017
ROHANA YUSUF, VERNON ONG AND HARMINDAR SINGH JJCA
20 APRIL 2019

Civil Procedure — Striking out — Appeal against order allowing striking out — Plaintiff brought derivative actions against defendants — Defendants applied to strike out plaintiff's originating summons — High Court allowed striking out applications — Whether High Court correct in allowing striking out application on the ground that plaintiff failed to fulfill locus standi threshold — Whether plaintiff had locus standi to bring derivative action against defendants — Whether High Court correct in allowing striking out application on the ground of multiplicity of proceedings — Whether there was multiplicity of proceedings — Rules of Court 2012 O 18 r 19

Vide an originating summons ('the OS'), the plaintiff had brought derivative actions against the four defendants. The first defendant was the plaintiff's mother, and the second defendant was the plaintiff's father who was an undischarged bankrupt. The third and fourth defendants were the subject companies in question. It ought to be noted that prior to the filing of the OS, the first defendant had commenced an action under s 181 of the Companies Act 1965 ('the CA') against the plaintiff and the plaintiff in response had also filed a counterclaim against the first defendant's claim. Coming back to the OS, on the applications by the defendants under O 18 r 19 of the Rules of Court 2012, the High Court had struck out the OS on the grounds, inter alia: (a) that the plaintiff had failed to fulfill the locus standi threshold; and (b) multiplicity of proceedings. The present appeals were filed against the High Court's decision in striking out the OS.

Held, dismissing both the appeals with costs of RM15,000 for each appeal subject to allocator:

(1) The issue of locus standi should be decided as a preliminary point as it was in essence a threshold issue. In this regard, it was trite that the onus was on the plaintiff to establish a prima facie case that it was entitled to bring a derivative action. The requirements to be fulfilled in order to succeed on the locus standi issue were, firstly, that the company itself was unable to sue because the wrongdoers were themselves in control of its decision-making organs. Secondly, it must be established that the

wrongdoers would not permit an action to be brought in the name of the company. Thirdly, it was mandatory for all the wrongdoers and the company to be cited as defendants in the derivative action. This was to provide an opportunity for them to respond to the allegations (see para 15).

(2) The court agreed with the learned judge that the plaintiff had failed to fulfil the locus standi threshold of establishing that the wrongdoers had prevented any action from being taken and had also failed to name all the members of the board in the OS as per her allegations. On this ground alone, and without more, the appeals ought to be dismissed (see para 21).

(3) The learned judge had fallen into error by applying a rather formalistic and dogmatic approach to the issue for multiplicity of actions. There were distinguishing factors between a minority oppression suit and a derivative action. In the present case, the reliefs claimed in the OS were specific to third and fourth defendants not personal to the plaintiff. These reliefs may not be available in the action under s 181 of the CA. In addition, the s 181 action was initiated by the first defendant, not the plaintiff. Even if there was some concern about diverse findings on the same facts in each action, the learned judge had the discretion to order a stay until the parties applied for the two actions to be heard together or to be heard one after another in the same court. Considering the options available to the learned judge, the exercise of discretion to strike out the OS on this ground was harsh and unfair to the plaintiff (see paras 28–29, 34 & 36).

[Bahasa Malaysia summary

Melalui satu saman pemula ('SP'), plaintif telah memfailkan tindakan derivatif terhadap keempat-empat defendan. Defendan pertama adalah ibu plaintif, dan defendan kedua adalah bapa plaintif yang telah bankrap. Defendan ketiga dan keempat adalah syarikat-syarikat yang terlibat dalam tindakan ini. Harus diingat bahawa sebelum pemfailan SP ini, defendan pertama telah memulakan tindakan di bawah s 181 Akta Syarikat 1965 ('AS') terhadap plaintif dan bertindak balas dari tindakan tersebut, plaintif telah memfailkan tuntutan balas terhadap tuntutan defendan pertama. Kembali semula kepada SP ini, atas permohonan oleh defendan-defendan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012, Mahkamah Tinggi telah membatalkan SP tersebut dengan alasan, antara lain: (a) bahawa plaintif telah gagal memenuhi ambang locus standi; dan (b) prosiding berganda. Rayuan-rayuan semasa difailkan terhadap keputusan Mahkamah Tinggi yang membatalkan SP tersebut.

Diputuskan, menolak kedua-dua rayuan dengan kos RM15,000 untuk setiap rayuan tertakluk kepada alokator:

(1) Isu locus standi harus diputuskan sebagai isu awalan kerana pada

dasarnya ia adalah isu ambang. Dalam hal ini, adalah menjadi undang-undang yang mantap bahawa plaintiff bertanggungjawab untuk membuktikan kes prima facie bahawa dia berhak untuk mengemukakan tindakan derivatif. Syarat-syarat yang perlu dipenuhi untuk berjaya dalam isu locus standi adalah, pertama, bahawa syarikat itu sendiri tidak dapat memfailkan tindakan kerana orang yang melakukan kesalahan itu sendiri mengawal badan-badan pembuat keputusan. Kedua, perlu dibuktikan bahawa orang-orang yang melakukan kesalahan tidak akan membenarkan tindakan diambil atas nama syarikat. Ketiga, wajib bagi semua orang yang melakukan kesalahan dan syarikat dimasukkan sebagai defendan dalam tindakan derivatif. Ini untuk memberikan peluang kepada mereka untuk memberikan jawapan bagi tuduhan-tuduhan yang dilontarkan (lihat perenggan 15).

(2) Mahkamah bersetuju dengan hakim yang bijaksana bahawa plaintif telah gagal memenuhi ambang locus standi untuk membuktikan bahawa pihak yang melakukan kesalahan telah menghalang tindakan diambil ke atasnya dan juga gagal menamakan semua ahli lembaga pengarah dalam SP seperti yang didakwa oleh plaintif. Atas alasan ini sahaja, dan tanpa mengambil kira yang lain, rayuan ini harus ditolak (lihat perenggan 21).

(3) Hakim yang bijaksana telah terkhilaf dengan menerapkan pendekatan yang agak formalistik dan dogmatis terhadap isu prosiding berganda. Terdapat faktor yang membezakan antara tuntutan penindasan minoriti dan tindakan derivatif. Dalam kes ini, relif yang dituntut dalam SP adalah khusus untuk defendan ketiga dan keempat dan bukan untuk kepentingan peribadi plaintif. Relif ini mungkin tidak tersedia dalam tindakan di bawah s 181 AS. Sebagai tambahan, tindakan s 181 dimulakan oleh defendan pertama, bukan plaintiff. Walaupun terdapat keraguan berkenaan dapatan yang berbeza mengenai fakta yang sama dalam setiap tindakan, hakim yang bijaksana mempunyai budi bicara untuk memerintahkan penangguhan sehingga pihak-pihak memfailkan permohonan agar kedua-dua tindakan tersebut didengar bersama atau didengar satu demi satu di mahkamah yang sama. Dengan mempertimbangkan pilihan yang ada pada hakim yang bijaksana, pelaksanaan budi bicara untuk membatalkan SP dengan alasan ini adalah keterlaluan dan tidak adil bagi plaintif (lihat perenggan 28–29, 34 & 36).]

Cases referred to

A company, Re [1986] BCLC 68, Ch D (refd)
Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)
Arnold and others v National Westminister Bank plc [1991] 2 AC 93, HL (refd)
Charnley Davies Ltd (No 2), Re [1990] BCLC 760, Ch D (refd)

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [2001] 6 MLJ 417, HC (refd)
Foss v Harbottle [1843] 67 ER 189 (refd)
Henderson v Henderson [1843–60] All ER Rep 378; (1843) 3 Hare 100 (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)
Kingdom Seekers Ventures Sdn Bhd v Dato' Sri Chong Ket Pen & Ors [2015] MLJU 390; [2015] 1 LNS 546, HC (refd)
Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal [2014] 3 MLJ 10; [2014] 2 CLJ 401, FC (refd)
Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290, SC (distd)
Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd [1988] 2 MLJ 184; [1987] CLJ Rep 160, SC (refd)
Penang Port Commission v Kanawagi s/o Seperumaniam [2008] 6 MLJ 686, CA (distd)
Prudential Assurance Co Ltd v Newman Industries Ltd And Others (No 2) [1982] Ch 204, CA (refd)
Taunton-Collins v Cromie and another [1964] 2 All ER 332, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 181
Companies Act 1985 [UK] s 459
Companies Act 2016 s 346
Courts of Judicature Act 1964 s 25(2), Schedule, item 11
Rules of Court 2012 O 18 r 19

Appeal from: Originating Summons No WA-24NCC-271–06 of 2016, High Court (Kuala Lumpur)

David Mathews (Harvinderjit Singh, Sara Ann Chay, Malarvily Perumal and Barry Goh with him) (Vin Law Co) in Civil Appeal Nos W-02(IM)(NCC)-561–03 of 2017 and W-02(IM)(NCC)-562–03 of 2017 for the appellants.
P Gananathan (Yeoh Kai Ying with him) (Gananathan Loh) in Civil Appeal No W-02(IM)(NCC)-561–03 of 2017 for the respondents.
Robert Low (Karen Yong with him) (Ranjit Ooi & Robert Low) in Civil Appeal No W-02(IM)(NCC)-562–03 of 2017 for the respondents.

Harmindar Singh JCA (delivering judgment of the court):

[1] There are two appeals before us. The first Appeal No W-02(IM)-561–03 of 2017 ('Appeal 561') relates to the order of the High Court striking out the originating summons ('the OS') upon the application by the third defendant (the first respondent in Appeal 561) vide encl 11. The second Appeal

No W-02(IM)-562–03 of 2017 ('Appeal 562') relates to the order of the High Court striking out the OS upon the application of the first defendant (the first respondent in Appeal 562) vide encl 17. Both orders were made by the High Court at Kuala Lumpur on 13 March 2017.

[2] Aggrieved with the orders made, the appellant filed these appeals contending that the High Court was plainly wrong in arriving at the said decisions. After careful consideration of the written submissions filed by all parties and after hearing oral arguments, we were of the unanimous view that the appeals were without merit. We therefore dismissed the appeals and affirmed the decision of the High Court. We now provide the reasons for so doing which will form the judgment of this court. For convenience, the parties will be referred to as they were in the High Court or by their abbreviations.

BACKGROUND FACTS

[3] The OS commenced by the plaintiff was in effect a double derivative action against four defendants. The first defendant, Ng Pik Lian ('NPL') was the plaintiff's mother. The second defendant, Tai E King ('TEK'), was the plaintiff's father who is an undischarged bankrupt. The third and fourth defendants, New Way Capital Sdn Bhd ('NWC') and United Eastern Resources Sdn Bhd ('UER'), were the subject companies in question.

[4] The plaintiff commenced the said OS in a representative capacity for and on behalf of all shareholders of UER and NWC (except for NPL) and for the benefit and on behalf of UER and NWC in respect of the alleged wrongdoing committed against NWC where it was alleged that:

(a) TEK continued to act as corporate representative of UER and participated in the management of NWC and UER despite his status as a bankrupt;

(b) NPL, working in concert with two other illegally appointed directors of NWC, used the illegal actions of TEK to usurp control of NWC at board and members level, thereby circumventing check and balances that were originally in place;

(c) NPL thwarted the plaintiff's attempts in 2014 and 2016 to requisition board meetings and EGMs of UER; and

(d) the illegal directors of NWC together with TEK caused NWC's audited financial accounts for 2012–2014 to be approved without regard to queries raised by the plaintiff.

[5] The derivative action was brought by the plaintiff as a 50% shareholder of UER for and on behalf of UER and its subsidiary, NWC. Her mother, NPL,

was also a 50% shareholder in UER. Both of them were the directors of UER at the relevant time. UER had a 66.7% interest in NWC whilst NPL had a direct interest of 33.3% in NWC. The directors of NWC were the plaintiff, NPL, Tai Hean Leng ('THL'), who was the plaintiff's brother, and one Lau Yoke Leong.

[6] Prior to the filing of the OS, proceedings were commenced by NPL in February 2013 pursuant to s 181 of the then Companies Act 1965 ('the CA 1965') against the plaintiff and other parties for misuse of funds ('the s 181 proceedings'). That proceeding culminated into a global settlement agreement ('GSA') which was recorded by way of a consent order by the court ('consent order').

[7] Nevertheless, the plaintiff subsequently filed a writ action to nullify and set aside the GSA and consent order ('the GSA suit'). On 21 February 2017, the GSA and the consent order were set aside by the High Court hearing the GSA suit. The effect was that the s 181 proceedings were revived.

[8] So, although there were reliefs being sought by the parties in the s 181 proceedings as there was a counterclaim as well, the plaintiff commenced the present OS ostensibly for the reason that some wrongdoings in the subject companies needed to be remedied. This can be seen from the prayers sought in the OS seeking for, inter alia, the following orders:

(a) orders to declare TEK incapable or unfit from acting as the corporate representative of UER in NWC and for the plaintiff to be recognised as the lawful corporate representative of UER in NWC;

(b) orders declaring all acts and approvals of TEK as the corporate representative of UER in NWC and all acts of the illegally constituted board of directors of NWC as null and void and to set aside the same;

(c) an order appointing an independent auditor to investigate and audit the accounts and financial affairs of NWC and its wholly and/or substantially owned subsidiaries and to prepare a forensic audit report; and

(d) other consequential orders to give effect to the above.

DECISION OF THE HIGH COURT

[9] The striking out applications were premised under O 18 r 19 of the Rules of Court 2012. The principal grounds were that the plaintiff did not have the requisite locus standi to commence the action, the plaintiff was barred from commencing the action by reason of res judicata and/or issue estoppel and there was a multiplicity of proceedings where similar issues were raised which

were the subject matter of other pending legal proceedings.

[10] Both the applications were heard together. The learned judge allowed the applications and struck out the plaintiff's action. The learned judge provided the reasons for doing so in the grounds of decision. The reasons can be summarised as follows.

[11] Firstly, it was the learned judge's finding that there was a paucity of evidence to show that attempts were made to have the board of directors consider the purported wrongdoings. In this regard, the learned judge stated (at p 19):

> [48] There is paucity of evidence to show that the plaintiff had brought specific resolution for deliberation of the board of directors of either of the subject companies in relation to the purported wrongdoings prior to the filing of the proceedings herein. More specifically, there is insufficient evidence to show that attempts on the part of the plaintiff (in any) to have the matters considered at board or shareholder meetings of either NWC or especially UER (where she has a direct shareholding) had in any fashion been prevented or scuttled by the wrongdoers in control. This shortcoming does little to progress the case of the plaintiff. Indeed, the originating summons seeking to initiate a derivative action must accordingly fail.

[12] Secondly, the learned judge held that the failure by the plaintiff to name all the wrongdoers was fatal as there were another two directors who were not named in the action. This meant that the threshold locus standi issue remain unfulfilled. This is how the learned judge put it (at p 21):

> [53] At the risk of repetition, I emphasise that not only did the plaintiff not establish she had made attempts to get the boards or members of UER and NWC to consider taking legal action against those who allegedly perpetrated a wrong to these subject companies, or that those wrongdoers in control prevented any such actions from being instituted, but that the plaintiff had also not identified with requisite specificity who these alleged wrongdoers were, by failing to name all members of the board of NWC in the originating summons. The threshold locus standi issues unfulfilled, the instant originating summons, being a derivative action, must fail.

[13] Thirdly, the learned judge considered that there was a multiplicity of proceedings by virtue of, firstly, the s 181 proceedings brought by NPL with a counterclaim by the plaintiff here, and secondly, the present OS brought by the plaintiff. The learned judge found that the issues raised were substantially the same with the result that a finding on the issues in one action cannot be different in another. In other words, issue estoppel operated to prevent abuse of process of the court. The learned judge concluded thus (at pp 27–28):

> [73] In the instant case, it would as such be highly irregular for the originating summons to be pursued in this court when the same issues ought to adjudicated and determined by the s 181 proceedings in another High Court having seized of the

jurisdiction of hearing the case where the subject-matter was first instituted and filed. As I have emphasised in *Hup Heng Poultry*, to have the matter heard and decided in the later originating summons regardless, would unwittingly allow the court to be privy to the abuse of its own process, which situation must vigorously be avoided in order to ensure the integrity of the administration of the justice system is duly safeguarded and given due regard at all times.

[74] Accordingly, given the substantial similarity of issues as set out in the averments of the parties in the originating summons and in the s 181 proceedings, it is more than justified that s 25(2) of the CJA be invoked to strike out the originating summons as the same offends the rule against multiplicity of proceedings and is therefore an abuse of process.

THE INSTANT APPEAL

[14] Before us, much of the same arguments were canvassed by the plaintiff/appellant to show that the learned judge had arrived at an erroneous finding. The issues raised and the submissions that followed were considered in the following fashion.

PRE-REQUISITES FOR COMMON LAW DERIVATIVE ACTION

[15] The applications to strike out the plaintiff's suit were premised on the issue of the locus standi of the plaintiff to commence the instant derivative action. The law in this context is without controversy and can be summarised as follows. The issue of locus standi should be decided as a preliminary point as it is in essence a threshold issue. In this regard, it is trite that the onus is on the plaintiff to establish a prima facie case that it is entitled to bring a derivative action. The requirements to be fulfilled in order to succeed on the locus standi issue, include, firstly, that the company itself is unable to sue because the wrongdoers are themselves in control of its decision-making organs. Secondly, it must be established that the wrongdoers will not permit an action to be brought in the name of the company. Thirdly, it is mandatory for all the wrongdoers and the company to be cited as defendants in the derivative action. This is to provide an opportunity for them to respond to the allegations (see *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; *Prudential Assurance Co Ltd v Newman Industries Ltd And Others (No 2)* [1982] Ch 204; *Kingdom Seekers Ventures Sdn Bhd v Dato' Sri Chong Ket Pen & Ors* [2015] MLJU 390; [2015] 1 LNS 546).

[16] The main complaint by the plaintiff in this respect was that the learned judge had failed to observe that the plaintiff had made three attempts in August 2014 and May 2016 to requisition board meetings as well as an EGM of UER to resolve the illegal actions of TEK. It was argued that NPL had not cooperated and, as a result, these meetings were never carried out due to coram failure. It was also contended that the plaintiff had also brought to the notice of

A the UER Board of Directors all the wrongdoings including the actions of TEK and the unlawful appointments of THL and Lau Yoke Leong.

[17] The plaintiff also argued that the learned judge was in error when he decided that the other two directors, THL and Lau Yoke Leong, needed to be named personally in the action. It was asserted that there was no need for them to be named as these two directors were appointed illegally. It was submitted that although not named, these directors had participated in the proceedings and that the learned judge was being overly formalistic in his reasoning which ignored the fact that all proper parties against whom remedies were sought were cited.

[18] With respect, we were not persuaded that these contentions had any merit. The learned judge had indeed considered all the evidence adduced. He then came to a finding which we considered to be warranted by the evidence and the law. In this context, we agreed with the learned judge's observations stated as follows (at pp 17–18):

> [44] In my evaluation however, the plaintiff did not succeed in demonstrating evidence of either the plaintiff's attempts at having the matter deliberated by the boards for actions be taken against the wrongdoers or that the boards of the subject companies were preventing the subject companies (UER and NWC) from filing proceedings against the wrongdoers. Crucially, there is no evidence such as board meeting minutes or resolutions to show the alleged wrongdoings were ever brought to the attention of either of the two boards.
>
> [45] The plaintiff must show that she had attempted to formally invoke the requisite company procedures in accordance with the governing constitution, being the articles of association of the company, before initiating a derivative action. For instance, as a director, she could have tried to requisition a directors' meeting by giving notice to the company secretary. No evidence of this was produced. Such failure is fatal and no locus can in such a situation like the present, vest in an applicant intending to initiate a derivative action.
>
> ...
>
> [47] In the instant case, I further observe that short of adherence to the formal process, there were letters between the plaintiff and the first defendant, including in respect of a request made by the plaintiff to the first defendant to convene a board meeting of UER. But I do not think this is sufficient. In order to establish locus, the applicant must show that attempts have been made towards the proper invocation of the company procedural rules governing meetings. In any event, I should highlight that there was no similar evidence of any letters (let alone requisition notices or board minutes or resolutions) seeking to convene a board meeting of NWC. Yet, the plaintiff is a director of both UER and NWC.
>
> [48] There is paucity of evidence to show that the plaintiff had brought specific resolution for deliberation of the board of directors of either of the subject companies in relation to the purported wrongdoings prior to the filing of the proceedings herein. More specifically, there is insufficient evidence to show that

attempts on the part of the plaintiff (in any) to have the matters considered at board or shareholder meetings of either NWC or especially UER (where she has a direct shareholding) had in any fashion been prevented or scuttled by the wrongdoers in control. This shortcoming does little to progress the case of the plaintiff. Indeed, the originating summons seeking to initiate a derivative action must accordingly fail.

[19] As for the contention that only those who are involved in wrongdoing need to be named, we found this to be contrary to the averment of the plaintiff that it was the boards of UER and NWC that had prevented action from being taken. If this was the position taken, it was only appropriate that all the directors be named as they must, by the plaintiff's own contention, be the alleged wrongdoers.

[20] The circumstances prevailing in the instant case are not too dissimilar to the case of *Kingdom Seekers Ventures Sdn Bhd v Dato' Sri Chong Ket Pen & Ors*, where the High Court observed:

> [21] In the circumstances of the present case, and especially considering that D7 was a public listed company with independent directors and under the supervision of Bursa Malaysia, it was, in my view, incumbent on the plaintiff to show that the board of directors of D7 will not permit an action to be brought against D1, the purported principal wrongdoer. This is more so in the instant case where the independence of the six independent directors is not in issue.
>
> [22] Significantly as it would appear, there has been no attempt to inform or bring to the attention of the Board the allegations as contained in the statement of claim. It was only after this suit was filed that the board was informed for the first time in the board meeting on 31 October 2014. In fact, D7 was served with an unsealed copy of the instant writ of summons and statement of claim on 28 October 2014.
>
> ...
>
> [32] In the result, and for the reasons stated above, I am constrained to hold that no prima facie case has been established to show that the wrongdoers are in control and are not permitting an action to be brought in the name of the company. If indeed the board of directors of D7 had obstructed action from being taken, the directors ought to have been named as wrongdoers. The fact that the directors have not been named raises doubt as to the credibility of the plaintiff's assertions that the board will not allow its action against D1. It is my finding therefore that the plaintiff has not met the threshold on its pleaded case. For these reasons, the plaintiff's action is frivolous and vexatious and an abuse of the court process and ought to be struck out.

[21] In the circumstances, we agreed with the learned judge that the plaintiff had failed to fulfil the locus standi threshold of establishing that the wrongdoers had prevented any action from being taken and had also failed to name all the members of the board in the OS as per her allegations. On this ground alone, and without more, the appeals must be dismissed.

A MULTIPLICITY OF PROCEEDINGS

[22] For the sake of completeness, we also deliberated on the other ground that found favour with the learned judge in striking out the plaintiff's OS. The learned judge considered that the plaintiff had raised the same complaints here as were raised in the s 181 proceedings. In this context, the learned judge observed (at p 23):

> [57] I reiterate that in my assessment, having examined the affidavits of parties, most of the crux of the subject matter and the issues raised in the instant originating summons had already been set out in the s 181 proceedings as contained in the affidavits of the parties. It is difficult not to conclude that the fundamental basis and subject-matter of dispute in the originating summons in encl 1 are the same in substance, character and effect, as well as being premised on substantially the same facts, as those in the s 181 proceedings filed first in time, and now resurrected by the judgment setting aside the GSA.

[23] The learned judge took the view that with the institution of the OS, the plaintiff was seeking the adjudication of matters that were already the subject matter of dispute in the s 181 proceedings which had been filed earlier. This gave rise to a multiplicity of proceedings which the High Court had the power to dismiss under its inherent jurisdiction or in pursuance to s 25(2) of the Courts of Judicature Act 1964 ('the CJA 1964') read together with item 11 of the Schedule to the CJA 1964 which states:

> Power to dismiss or stay proceedings where the matter in question is res judicata, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

[24] Relying also on the cases of *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637; *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [2001] 6 MLJ 417; *Penang Port Commission v Kanawagi s/o Seperumaniam* [2008] 6 MLJ 686 ('Kanawagi') and *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 ('Lai Kim Loi'), the learned judge held that the plaintiff was seeking to pursue a multiplicity of proceedings and accordingly exercised his discretion to strike out the OS the filing of which was considered to be an abuse of process.

[25] Now, the objection to multiplicity of proceedings is well-founded. It is in the public interest to avoid conflicting decisions by two different courts on the same issue between parties (see *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 184; [1987] CLJ Rep 160 and *Taunton-Collins v Cromie and another* [1964] 2 All ER 332). Conflicting decisions on the same issue not only brings embarrassment to the court but may also undermine public confidence in the administration of justice.

[26] The other objection to multiplicity of proceedings is the same rationale used to advance the plea of res judicata or estoppel. It is that a party ought not to be unnecessarily harassed by multiple proceedings on the same issue. As in res judicata, the public interest is the same; there should be finality in litigation and parties should not be twice vexed in the same matter (see *Henderson v Henderson* [1843-60] All ER Rep 378; (1843) 3 Hare 100; *Arnold and others v National Westminister Bank plc* [1991] 2 AC 93 and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1).

[27] The multiplicity objection differs from res judicata in that in a multiplicity situation, the courts have yet to decide on the issues. It is more a case of a party abusing the process of the court by raising the same cause of action or issues before different courts. It may perhaps be analogous to the doctrine of res judicata in the wider sense as decided in the celebrated case of *Henderson v Henderson*, where it was held that res judicata would preclude a party from raising in subsequent proceedings matters which were not, but could and should have been brought forward, if reasonable diligence had been exercised. However one looks at it, the objective is the same; to prevent oppressive and unnecessary litigation which is underpinned by the public policy against re-litigating identical claims.

[28] So, in our view, the question the learned judge ought to have asked himself was whether the instant OS amounted to oppressive and unnecessary litigation giving rise to the overwhelming supposition that it was an abuse of the court process. In our respectful view, considering the factual matrix in the present case, the answer to that question must invite a negative response. With respect, the learned judge had fallen into error by applying a rather formalistic and dogmatic approach to the issue for multiplicity of actions. We do not think the doctrine of res judicata or multiplicity should be applied in such an inflexible fashion. In this context, Lord Keith in the *Arnold* case, expressed the view (at p 109B): 'One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have opposite result'.

[29] On this score, it is imperative to note that there are distinguishing factors between a minority oppression suit (then under s 181 of the CA 1965 and now under s 346 of the Companies Act 2016 ('the CA 2016')) and a derivative action. A shareholder, like the plaintiff here, may find relief problematic due to the twin hurdles of the 'majority rule' and the 'proper plaintiff rule' as decided in the celebrated case of *Foss v Harbottle* [1843] 67 ER 189.

[30] The shareholder, in that event, can bring an oppression suit under s 346 of the CA 2016. That provision gives a wide latitude to the courts to fashion

various remedies to bring to an end the oppressive conduct. Or the shareholder can bring a derivative action on behalf of the company. As it is an action brought on behalf of the company, the cause of action, as well as the remedy, is relevant to the company only. By protecting the company in this way, the shareholder benefits indirectly. Significantly, the relief available in this action may be different to that of an oppression action.

[31] In this way, it may often be the case that the facts relied upon in each action are the same so that either action is possible on the same facts. However, the nature of the complaint and the appropriate relief sought may be different in each case. In *Re a company* [1986] BCLC 68, Hoffman J refused to strike out the petition filed under s 459 of the UK Companies Act 1985 where the minority shareholders alleged that the company's assets were disposed of in a manner prejudicial to the interests of the petitioner. The UK s 459 provides relief to a member of a company. Hoffman J held that the fact that the petitioners could have brought a derivative action did not prevent them seeking relief under s 459.

[32] The foregoing observation was noted with approval by Millet J in *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at p 784:

> The very same facts may well found either a derivative action or a s 459 petition. But that should not disguise the fact that the nature of the complaint and the appropriate relief is different in the two cases. Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and a s 459 petition would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement; not remedy for misconduct.

[33] In a similar vein, the Federal Court in *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10; [2014] 2 CLJ 401 had occasion to note, through the judgment of Jeffery Tan FCJ, the distinguishing features of a minority oppression suit and a derivative action (at p 419):

> And secondly, a s 181 petition could be maintained even if relief might also have been obtained in a minority shareholders' action (see also *A Company* [1986] BCLC 68, where it was held by Hoffman J, as he then was, that the fact that the petitioners could also have brought a derivative action with respect to the conduct which was alleged to have contributed to the unfairly prejudicial behaviour did not preclude themfrom seeking relief under s 459). But where the loss suffered by the

minority shareholder is merely reflective of the loss suffered by the company, 'the general rule is that the reflective loss is not recoverable by the minority, as the company is the proper plaintiff to bring an action against the wrongdoing controllers. Where no injury apart from injury to the company in shown, it is arguable that the minority shareholder ought to commence a common law derivative action or apply to court under s 216A (of the Singapore Companies Act) for leave to bring an action on behalf of the company instead of proceeding under s 216A to obtain corporate rather than personal relief' (Walter Woon on *Company Law Revised* (3rd Ed) para 581 at p 183).

[34] In the present case, the reliefs claimed in the OS are specific to UER and NWC and not personal to the plaintiff. These reliefs may not be available in the s 181 proceedings. To recall, those proceedings were not initiated by the plaintiff. She only filed a counterclaim as she was entitled to do. So, it could hardly be said that the plaintiff was somehow responsible for instigating both actions. In the end, there was a clear omission on the part of the parties to reflect on the respective rights of shareholders and the duties of directors of a company. The acrimony between them probably coloured their judgment.

[35] Now, the learned judge relied on the cases of *Lai Kim Loi*, and *Kanawagi*, to support his proposition that there was a multiplicity of actions which cannot be countenanced by the court. However, we noted that there is a strong distinguishing factor in both cases in that the issues and the relief sought were identical in the two actions that were brought in each case. In short, the two authorities could not be relied upon as the factual matrix was different from the instant case.

[36] Even if there was some concern about diverse findings on the same facts in each action, the learned judge had the discretion to order a stay until the parties applied for the two actions to be heard together or to be heard one after another in the same court. The judge could then give directions as to the effect of the findings in each case and especially as to whether it would apply in the subsequent case. Considering the options available to the learned judge, the exercise of discretion to strike out the OS on this ground, with respect, was harsh and unfair to the plaintiff.

CONCLUSION

[37] In the circumstances, and for the reasons we have provided, we agreed with learned judge's decision on the issue of locus standi. We therefore dismissed both the appeals with costs of RM15,000 for each appeal subject to allocator. Deposit to be refunded.

Both appeals dismissed with costs of RM15,000 for each appeal subject to allocator.

Reported by Dzulqarnain bin Ab Fatar